DISTRIBUTED
MAY 16 1988

ORIGINAL

Supreme Court, U.S.
FILED
MAY 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

NUMBER 87-6746

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ADAM MIRANDA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALBERT W. BRODIE
Attorney at Law
1525 Response Road, Suite 3
Sacramento, CA 95815
Tele: (916) 648-1525

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

ARGUMENT.....1

I

THE USE OF UNADJUDICATED CRIMINAL CONDUCT SHOULD BE PRECLUDED AT THE PENALTY PHASE OF A CAPITAL PROCEEDING.....1

II

THE CALIFORNIA COURTS HAVE FAILED TO PROVIDE ANY STANDARD WITHIN WHICH TO WEIGH THE EVIDENCE OF UNADJUDICATED OFFENSES AT THE PENALTY PHASE.....3

III

PETITIONER WAS DENIED BOTH DUE PROCESS AND EQUAL PROTECTION OF THE LAW.....6

CONCLUSION.....7

TABLE OF AUTHORITIES

Furman v. Georgia
408 U.S. 238 (1972).....1

Gregg v. Georgia
428 U.S. 153 (1976).....1, 2

Hill v. Lockhart
474 U.S. 52 (1986).....2

Hudson v. United States
272 U.S. 451 (1926).....2

In re Winship
397 U.S. 358 (1970).....3

Mullaney v. Wilbur
421 U.S. 684 (1975).....3

North Carolina v. Alford
400 U.S. 25 (1970).....2

People v. Davenport
41 Cal.3d 247, 710 P.2d 861 (1985).....4

People v. Phillips
41 Cal.3d 29, 711 P.2d 423 (1985).....5

People v. Robertson
33 Cal.3d 21, 655 P.2d 279 (1982).....3, 4, 6, 7

People v. Rodriguez
42 Cal.3d 730, 726 P.2d 113 (1986).....4

Profitt v. Florida
428 U.S. 242 (1976).....1

Pulley v. Harris
465 U.S. 37 (1984).....1

Woodson v. North Carolina
428 U.S. 280 (1976).....2

ARGUMENT

I

THE USE OF UNADJUDICATED CRIMINAL CONDUCT SHOULD BE PRECLUDED AT THE PENALTY PHASE OF A CAPITAL PROCEEDING

Petitioner questions the claim that the use of unadjudicated other crimes evidence has already been disposed of by this Court. Respondent's Opposition (hereinafter "Resp.") 5.

Two of the cases cited for this proposition, i.e. Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), addressed the constitutionality of the captioned states' death penalty laws following Furman v. Georgia, 408 U.S. 238 (1972). These opinions, although dealing with statutes which contained provisions permitting the use of uncharged offenses, never specifically decided this issue. The third case, Pulley v. Harris, 465 U.S. 37 (1984), dealt with California's 1977 death penalty law, the immediate predecessor to the statute under which petitioner was tried. Here the Court addressed the concept of proportionality in application of the death penalty, and never touched upon the question of uncharged offenses. An opinion cannot stand as precedent on an issue not addressed.

Petitioner does not argue that this Court should establish a "uniform and nationally compelled set of rules and procedures" in capital proceedings on the question of unadjudicated offenses. Resp. 6. What he does argue is that if a component part of any death penalty scheme is constitutionally suspect, whether it be contained in the statutes of one state or many states, that this Court has the power to review such statutes and direct that the offending provision be excised or modified to meet a minimum constitutional standard. Furman v. Georgia, supra, 408 U.S. 238.

Petitioner's citation to the laws of our sister states was presented to illustrate that questions surrounding the introduction of unadjudicated offenses at the penalty phase of a capital proceeding are a national concern that should be addressed and clarified by this Court. He asks for no uniform set of rules. He rather asks for a determination of whether the use of such evidence is constitutionally permissible, after which the states will be free to craft their respective statutes to conform to this standard. Gregg v. Georgia, supra, 428 U.S. at 195 (opinion of Stewart, Powell and Stevens, JJ.).

Petitioner also disputes the claim that "there is no doubt as to petitioner's guilt concerning the murder of Robert Hosey." Resp. 9. In North Carolina v. Alford, 400 U.S. 25, 36 (1970), this Court found that there is no bar to imposition of sentence upon an accused who is unwilling to admit his guilt, but who is willing to waive trial and accept the sentence in light of the alternatives. See also Hill v. Lockhart, 474 U.S. 52, 56 (1985), Hudson v. United States, 272 U.S. 451 (1926).

Both parties to this proceeding have noted that petitioner pled guilty to the Hosey murder. Petn. 5 and fn. 2, Resp. 9. In exchange for the plea and the sentence imposed, the bargain precluded the People from using the evidence of this plea in any retrial. See Petn. 5 fn. 2. Since, under California law, the only sentence petitioner could receive for the murder of Gary Black and the finding of special circumstances was death or life without parole, the addition of 15 years to his previous sentence, and the plea bargain itself, pales in its significance.

Turning to the final contention in this area, it may be true that the penalty determination process is not presently part of the adjudicatory mechanism to which the "full panoply of rights" attaches. Resp. 10. However, in light of this Court's opinions which hold that "death is different," and that care must be exercised to insure that death is the appropriate punishment, Gregg v. Georgia, supra, 428 U.S. at 188, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), the rights of an accused at the penalty phase of a capital

proceeding should be expanded to include the exclusion of unadjudicated offenses.

II

THE CALIFORNIA COURTS HAVE FAILED TO PROVIDE ANY STANDARD WITHIN WHICH TO WEIGH THE EVIDENCE OF UNADJUDICATED OFFENSES AT THE PENALTY PHASE

Respondent initially claims that In re Winship, 397 U.S. 358 (1970), does not require application of the reasonable doubt standard to the receipt of other crimes evidence at the penalty phase of a capital trial. Resp. 12. Such a claim is made without reference to Mullaney v. Wilbur, 421 U.S. 684 (1975), which held that the safeguards of due process do not disappear simply because a verdict of guilty has been entered, 421 U.S. at 698, and that the prosecution bears the burden of proving beyond a reasonable doubt all factors which would increase the penalty imposed upon the accused. 421 U.S. at 703-704; Petn. 11-13.

Petitioner agrees that, following conviction in a capital proceeding, due process guarantees "that the state act in a reasonable and fundamentally fair way in determining and executing sentence." Resp. 13-14. The question is whether the failure to give the reasonable doubt instruction in the instant case fulfilled these due process requirements.

Respondent appears to argue that the reasonable doubt instruction has only been a part of the capital sentencing scheme in California since the opinion in People v. Robertson, 33 Cal.3d 21, 655 P.2d 279 (1982). Resp. 14, 15. Such an argument ignores the holding of Robertson itself, which, in rejecting claims by the People that the reasonable doubt instruction had been repealed by the adoption of California's 1977 death penalty statute, recognized that this instruction had been required under California caselaw for almost twenty years. People v. Robertson, supra, 33 Cal.3d at 53-54, 655 P.2d at 298.

Respondent next quotes from the opinion in the instant case, and the finding by the California Supreme Court that the rule in Robertson "merely serves a foundational purpose requiring a higher standard of proof before evidence of other crimes may be considered by a jury..." Resp. 14, Petn. Appendix A, 51-52.

Neither respondent nor the California Supreme Court have ever explained how this higher standard of proof is to be applied if the jury is never informed of the standard. Standards of proof do not exist in a vacuum, and mean nothing if the trier of fact is never instructed on the burdens that they must apply in a given proceeding.

The purpose of the reasonable doubt instruction is to inform the jury how they are to evaluate the evidence they have heard in reaching the ultimate findings required of them in their deliberations. A jury cannot know of this standard, and cannot be expected to apply it, if they are never told of its existence.

A fair reading of the California Supreme Court's analysis of the reasonable doubt instruction in People v. Robertson, supra, 33 Cal.3d at 53-55, 655 P.2d at 298, shows that this standard was not adopted as an evidentiary rule, but, prior to the instant opinion, was always grounded on due process concerns.

In People v. Rodriguez, 42 Cal.3d 730, 791-792, 726 P.2d 113, 153 (1986), in a prior analysis of Robertson, the California Supreme Court found that "Implicit [in Robertson] is the notion that the People may not obtain the death penalty on the basis of uncharged criminal activity proved by a standard less stringent than would be required to convict the defendant of an uncharged crime." Although it is now claimed that the reasonable doubt standard is based on evidentiary grounds, Rodriguez and other cases prior to the instant opinion raise questions as to the claim that it is not mandated by due process considerations. See People v. Davenport, 41 Cal.3d 247, 280-281, 710 P.2d 861, 882 (1985), People

v. Phillips, 41 Cal.3d 29, 83, 711 P.2d 423, 459 (1985), Petn. 16 and cases cited therein.

Petitioner does not understand the claim that the reasonable doubt instruction "was in fact...applied in the instant case" and that no action is necessary on the part of this Court "in order to prevent future capital penalty determinations 'under a constitutionally defective standard.'" Resp. 15. The source of this confusion stems from the fact that it has been conceded the reasonable doubt instruction was never given at the penalty phase of this proceeding. Resp. 18, 19. Furthermore, as was previously noted, this standard was in place at the time of petitioner's trial.

Nor does petitioner understand how it can be maintained that the failure to give the reasonable doubt instruction constituted harmless error. The evidence at petitioner's penalty phase trial was not as clear or convincing as respondent supposes. As was noted on page 13 of the petition for certiorari, the need to give the reasonable doubt instruction "was particularly acute here, where the evidence of the Hosey murder was neither reliable nor overwhelming, based as it was on the testimony of accomplice Joseph Saucedo and the unconfronted hearsay statements of Patricia Torres." In light of such suspect evidence, it cannot be said that at least one juror would not have voted against the death penalty had the venire been informed of the reasonable doubt standard.

Petitioner maintains that the protections accorded by the reasonable doubt instruction are as important at the penalty phase of trial as at the guilt phase, and such instruction must be given to the jury in order to guide them in their deliberations as to the ultimate penalty. Failure to give such an instruction here, in light of the state of the evidence presented at the penalty phase, did not constitute harmless error.

///

///

III

PETITIONER WAS DENIED BOTH DUE PROCESS AND EQUAL PROTECTION OF THE LAW

Petitioner did not argue that "the California Supreme Court violated his federal constitutional rights in holding that this determination [the giving of the reasonable doubt instruction] is predicated solely upon state law." Resp. 17. Rather, petitioner maintains that he was denied federally protected rights to due process and equal protection in not receiving the benefit of the established laws of the State. Petn. 14-18.

Respondent's remaining arguments in this area border on sophistry. He initially notes, in apparent contradiction to the argument posited on pages 14, 15 and fn. 3 of his Opposition, that the State of California "did in fact require the meeting of the reasonable doubt standard with respect to other crimes evidence at the penalty phase and also instruction to the jury to that effect," at the time of petitioner's trial. Resp. 18. Yet he proceeds to assert, despite the fact no such instruction was given during petitioner's penalty phase proceedings, that "no deprivation of a procedural right as a matter of state law ever occurred in the instant case." Id.

It is then argued, as it was in Argument II, supra, that the need to give the reasonable doubt standard has somehow become different as "numerous changes in state and federal capital case law took place, as well as significant statutory changes within California." Resp. 18. As was previously noted, a similar argument was rejected by the California Supreme Court in People v. Robertson, supra, 33 Cal.3d at 53-54, 655 P.2d at 298. Petitioner maintains that the reasonable doubt standard is the reasonable doubt standard. Simply put, it is a due process requirement which remains constant in the face of statutory changes.

Turning to petitioner's equal protection claim, respondent,

although arguing that the reasonable doubt standard has never been abrogated in California, and that it was in effect at the time of petitioner's trial, Resp. 19, concludes that "The fact that the trial court erred in failing to anticipate the Robertson holding in terms of the continued requirement does not change this result in the slightest."

Respondent does not explain how the deprivation of an established right, which at the time of the instant proceeding admittedly was and still is a part of California law, is not a denial of equal protection. He additionally does not explain why "There is simply no reason to assume, as petitioner does, that he is similarly situated with respect to all other capital defendants in this jurisdiction." Resp. 20. There is in California a cognizable class of individuals who, as capital defendants, received the benefit of the reasonable doubt instruction at their penalty trials. Petitioner was denied both equal protection and due process of law in not being accorded similar treatment.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Albert W. Brodie

ALBERT W. BRODIE
1525 Response Road, Suite 3
Sacramento, CA 95815
(916) 648-1525

Attorney for Petitioner